United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

A. H. FAVOUR and A. G. BAKER,
Appellants,

vs.

HARRY W. HILL, Receiver of Intermountain Building and Loan Association,
Appellee.

No. 9847

BRIEF OF APPELLEE

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ABSTRACT OF THE CASE

The Special Master found that on April 30, 1934, one Barrett paid in cash to the record attorneys of Margaret Cobb the entire amount called for in the judgment she had obtained against the Association. The Court below approved and adopted this finding and it is not challenged by the appeal. From this undisputed fact the Special Master concluded as matters of law that: (1) the cash payment was made and received in full satisfaction of the Cobb judgment; (2) that it is not necessary for an execution to issue or a judicial sale to be held in

order to work the satisfaction of a judgment, inasmuch as the test of satisfaction is whether the judgment creditor has received full payment; (3) that by reason of her receipt in cash of the entire sum called for by her judgment Margaret Cobb had no subsisting judgment rights to assign; (4) that the assignees of Margaret Cobb ocupied no better position and had acquired nothing by assignment; (5) that any right on the part of appellants to recover against the Association or the Receiver must rest on something other than the vitality of the Margaret Cobb judgment under which they claim; (6) that if Margaret Cobb could not recover as against the Association or the Receiver following her receipt of the entire amount called for in the judgment, then likewise her assignees cannot recover. The foregoing conclusions of law were adopted and approved by the Court below. The sole point raised on the appeal is that the conclusions of law are erroneous.

Our position is not limited to the narrow confines attributed to us in appellants' abstract of the case. We rely upon all of the legal conclusions drawn by the Special Master and adopted by the Court below. We further contend that even if the Cobb judgment was not extinguished by payment its ownership, for whatever it is worth, is in one Barrett. Barrett is not a party to these proceedings and is asserting no demand against the Association or its Receiver. We claim that no justiciable controversy is presented because appellants are unable to show a record ownership of the Cobb judgment. That ownership, assuming that the judgment has survived, is vested in Barrett. His rights, if any thereunder were not before the Court below and are not involved on this appeal.

SUMMARY OF ARGUMENT

I

Appellants claiming to be creditors of the receivership estate by reason of the Cobb judgment assertedly assigned to them, are unable to show privity of contract or estate with Cobb. It affirmatively appears that appellants are without privity of contract or estate and that one Barrett is the owner of the Cobb judgment. Since ownership of the Cobb judgment is the sole basis of the appellants' claim, we submit there is an absence of a justiciable controversy.

II

The conclusion of law that the payment of $1,064.06 to Margaret Cobb, which was made and received in full satisfaction of her judgment, extinguished and satisfied it so as to leave her nothing to assign, is fully and fairly supported by the undisputed facts.

A money judgment is extinguished and nothing passes by its assignment, if it appears without dispute that the judgment creditor has been fully paid in cash and that such payment was made and received with the intention of satisfying the judgment.

III

A money judgment is a non-negotiable instrument, and if assigned passes subject to all defenses available to the judgment debtor. Margaret Cobb, the judgment creditor, was paid in full and in cash prior to any assignment of her judgment. She could not file a judgment creditor's claim following her receipt of full pay-

ment, and her assignees who had notice of the facts, stand in no better position. Since the plea of payment of the judgment is good as against her, it is good as against her asserted assignees.

IV

An appellant is bound by the pleadings or the theory under which he proceeded in the trial court and on appeal he may not for the first time raise new or additional matters which were not presented below. Appellants' claim was not filed on the theory that they were subrogees. That theory was first presented on appeal. The sole basis of appellants' creditors' claim, as found by the Special Master, was that they claimed as assignees of the Cobb judgment. Hence, on appeal they cannot raise the new and additional ground that they are subrogees.

ARGUMENT

Appellants' Specifications of Error

Nos. 1 and 2

A

The only question presented is whether the lower court clearly erred in affirming and adopting the Special Masters conclusion of law. Appellants' creditors' claim was filed and proceeded upon the sole theory that they were assignees of the Margaret Cobb judgment and hence occupied the status of unpaid judgment creditors (Tr. 10-11). Appellants' claim as filed with the Receiver did not purport to be based upon the doctrine of subrogation. The present assertion of appellants that

they are subrogees was not presented either to the Special Master or the court below and is mentioned for the first time on this appeal.

In their statement of facts (Op. Br. 6) appellants assert that following the sheriff's return of sale *both* Cobb and Barrett assigned their interests in the judgment to appellants. This statement is contrary to the record. On May 17, 1934, seventeen days after the sheriff's sale, Margaret Cobb, who had previously received $1,064.06 in cash in full satisfaction of her judgment, purportedly assigned it to R. O. Barrett (Tr. 15). Barrett paid $10.00 and other valuable consideration for the assignment (Tr. 15), in which Margaret Cobb expressly covenanted that the judgment was in full force and that the sum of $1,000 with interest and costs remained owing thereunder (Tr. 15). According to the record this is the first and only assignment of the judgment attempted to be made by Margaret Cobb. Thus, it is apparent that if her judgment was still subsisting and still unsatisfied notwithstanding her receipt of all the money it called for, it passed by way of assignment to Barrett and not to appellants. If appellants own the Cobb judgment and if it is still subsisting they must trace their title back to Margaret Cobb, the original owner. This we submit is physially impossible without doing violence to the record since the only assignment appellants have is the one of April 30, 1934, which they took from Barrett (Tr. 15). The time element, which appellants either overlook or disregard, shows without dispute that on April 30, 1934, Barrett was not the owner of the Cobb judgment and no assignment thereof from Margaret Cobb was outstanding. Barrett did not receive an assignment of the judgment from Margaret

Cobb until seventeen days later (Tr. 14). Hence, on April 30, 1934, Barrett had no assignable interest in the judgment and of course could assign nothing to appellants. If the Cobb judgment is still outstanding and if it still possesses vitality, all of which we dispute Barrett is the owner thereof by the assignment of May 17, 1934. Barrett has not filed a claim with the Receiver nor has he made any appearance before the Special Master or the court below. Barrett is not a party to this appeal and his rights, if any, cannot be here determined. To us it seems clear from the undisputed facts that appellants have not owned nor do they now own the Cobb judgment, be it alive or discharged. The ownership, for whatever it is worth, is in Barrett, who so far as the record discloses has never made any assignment since May 17, 1934, when Margaret Cobb, the original owner, assigned to him. No justiciable controversy is presented to this court.

B.

In no manner waiving the foregoing position, we will proceed further with appellants' argument.

On April 30, 1934, immediately prior to the sheriff's sale, Margaret Cobb had a money judgment against the Association for $1000 plus interest and costs. At the sheriff's sale Barrett, a stranger to the proceedings in which the judgment was rendered, purported to purchase a mortgage owned by the Association and judgment debtor (Tr. 11-13). For this mortgage Barrett successfully bid the whole amount of the judgment and thereupon in cash paid to the plaintiff, through Favour and Baker, her attorneys of record, the sum of $1,064.06

(Tr. 14, 20). The sale and purchase was not a paper transaction such as exists when a judgment creditor bids in property of the judgment debtor without any actual cash being manually paid. As the Special Master and the Court below found, Margaret Cobb received in cash $1,064.06, which was the entire amount due under her judgment (Tr. 14, 20). So far as the record shows, she has never repaid it. Certainly, no one would contend that after receiving every penny called for in the judgment Margaret Cobb could have compelled the Association or its Receiver to pay her any further sums. As to her the judgment was and is satisfied in full. She had no further rights against the Association, either as judgment creditor or otherwise. Absent the subsequent attempted assignment of her judgment we think it must be conceded that she could not have filed a claim with the Receiver based on the theory that her judgment was unpaid. If she could not file such a claim in her own name and right, then how can appellants, who claim to be her assignees, assert that they have greater rights? All that they could take, assuming they could trace their title back to Margaret Cobb, would be such rights as she had to assign and, as we have demonstrated, there were none in existence. See 5 *Corpus Juris*, page 963, pp. 150, wherein it is said:

> "Nothing will pass to the assignee if the assignor never had the right claimed under the assignment, or if, having had it, he had already disposed of it, *or had settled the claim on which the right was based*." (Emphasis ours)

Our position also finds ample support in Section 21-515, *Arizona Code Annotated*, 1939, which reads:

> "An assignment of a chose in action shall not prejudice any set-off or other defense existing at the time of the notice of the assignment; but this section shall not apply to a negotiable promissory note or bill of exchange, transferred in good faith and upon good consideration before due."

If the defense of payment was available to the Association following the sheriff's sale and prior to any attempted assignment of the judgment by Margaret Cobb, then it follows under the Arizona code provision above mentioned that any assignment of the judgment was without prejudice to such existing defense, namely, the defense of payment.

Even absent a controlling statute upon the subject matter, the following rule of law would govern:

> "On a purchase and assignment of a judgment the rule of caveat emptor is generally applied in the same manner as in the purchase of any personal property. The general rule is that the assignee of a judgment stands in the place of, and has no better rights in regard to the judgment than, the assignor and that the assignee takes the judgment subject to all the equities and defenses which could be asserted against the judgment in the hands of the assignor at the time of the assignment, even if the assignee does not at the time of the assignment have notice of the outstanding equity or defense." 30 *Am. Juris.*, page 891, pp. 133)

The same rule is declared in 34 *Corpus Juris,* page 647, pp. 996.

On April 30, 1934, when Barrett attempted to assign the Cobb judgment to appellants he knew that the sum he had bid and actually paid in cash satisfied the judgment and that it possessed no further vitality. At that time he also knew he held no assignment from Margaret Cobb. He assumed that he had bought the mortgage offered at the sheriff's sale and that he was the owner thereof. Such assumption necessarily continued until November 28, 1938, when the Supreme Court of Arizona, in *Hill v. Favour, et al.*, 84 Pac. (2d) 575, 52 Ariz. 561, decided that the Association was still the owner of the mortgage. Up to that time no one thought that the Cobb judgment possessed vitality after payment on it had been made in full. Up to that time no creditor's claim had been filed on the judgment or otherwise. This same state of mind may equally be charged to appellants, who were the record attorneys for Margaret Cobb in the proceeding through which he obtained her judgment and who endorsed their satisfaction in full on the sheriff's return when Cobb bid and paid $1,064.06 in cash.

On and after April 30, 1934, Barrett and the appellants had full personal knowledge that the Cobb judgment had been paid in full and in cash and that it was satisfied of record, and that Margaret Cobb had no subsisting claim against the Association or its Receiver.

That the levy and sheriff's sale were held for naught nearly five years later, in *Hill vs. Favour, supra,* does not change the legal effect of the actual payment in full received by Margaret Cobb. She received every penny called for in her judgment, and if that payment satisfied her judgment, as we contend it did, then Sec-

tion 21-515 and the authorities we have cited must be given effect.

The satisfaction of a judgment means the payment of the money due thereunder and of course there can be but one satisfaction of judgment. 31 *Am. Juris.*, page 354, pp. 862. A judgment can be satisfied both in law and in fact without a record entry. The payment of the judgment is the satisfaction—the Clerk's entry is but evidence of the ultimate fact.

It seems to us that appellants' remedy, if they feel aggrieved, is to proceed against Barrett, who was their assignor, on the theory that there was a failure or absence of consideration for the assignment he gave them. Barrett if he were held liable on such a proceeding, could then undertake to recover from Margaret Cobb the money he paid her, inasmuch as in her assignment to him of May 17, 1934, she personally covenanted that the whole amount of the judgment with interest and costs was then unpaid. This thought finds support in 34 *Corpus Juris*, page 648, 649, pp. 998:

> "A bona fide purchaser of a judgment from an assignee takes the same subject to any equities between the judgment creditor and the assignee. The assignor is liable in damages to the assignee if the assignor does not in fact own the judgment, or if it has been extinguished wholly or partially before the assignment, or if he afterwards receives payment of the judgment or enters satisfaction of it, or if it is reversed or set aside after the assignment."

See also: *Jones v. Blumenstein* (Iowa) 42 N. W. 321.

The decision in Hill v. Favour, *supra,* and the order of the Superior Court of Yavapai County, Arizona, dated September 28, 1939 (Tr. 17) did not in any way change the position of Margaret Cobb or deprive the Association and its Receiver of the right to plead payment. Notwithstanding the decision of the Supreme Court of Arizona and the subsequent order of the Superior Court of Yavapai County, the fact remains that Margaret Cobb received every cent of money called for in her judgment and this we think every one will agree constituted full payment to her. The defense of payment, being good as against her, is good as against her claimed assignees.

As pointed out by the Special Master, appellants may have some remedy but "it must rest on something other than the vitality of the judgment of Margaret Cobb." (Tr. 21)

C.

Appellants have cited numerous authorities, both text and case, all of which in substance hold: WHERE THE JUDGMENT CREDITOR RECEIVES NOTHING OR IS NOT FULLY PAID HE OR HIS ASSIGNS MAY THEREAFTER BE RELIEVED FROM AN IMPROVIDENTLY ENTERED SATISFACTION OF THE JUDGMENT IN QUESTION. Doubtless this rule is sound and if the facts at bar were such as to warrant its application it might well be said that appellants' position is meritorious. However, the rule is not applicable because it affirmatively appears that Margaret Cobb, the judgment creditor, was actually paid cash in

hand the full amount of her judgment. This sum so far as the record shows has never been repaid or demanded back. It cannot be said that as to her there was any want or failure of consideration, or that so far as she was concerned her judgment was improvidently satisfied. Whether Margaret Cobb received the payment at a sheriff's sale subsequently declared void, or whether she received the money at home before the sale are immaterial. The time, place or circumstances of the payment are not material. The inescapable and unanswerable fact is that she did receive in cash the full amount of her judgment and that it was offered and paid to her in full satisfaction. To work a satisfaction, it is not necessary that there be a valid sale, or any sale after judgment. The test is whether or not the judgment creditor has been fully paid. The fact that Margaret Cobb has been fully paid, as found by the Special Master and the Court below, is not in dispute. Proceeding from that undisputed fact it certainly was not error for the Special Master and the Court below to conclude that the Cobb judgment could not form the basis of a valid creditor's claim.

According to the records, appellants did not predicate their claim upon the theory that they were subrogees or purchasers of the mortgage at the sheriff's sale. Their claim, as the record shows, is based solely upon the proposition that they are the *assignees* of the Margaret Cobb judgment (Tr. 11) and that by reason of the assignment they are entitled to enforce her judgment through the medium of a creditor's claim against the receivership estate. We say that since Margaret Cobb could not enforce her judgment after she had received and retained

full payment, it follows that her asserted assignees have no other or greater rights.

In the case of *Davis v. Gaines,* 104 U. S. 386, 26 L. Ed. 764, relied upon so earnestly by appellants, we find an entirely different set of facts than those at bar. All that the Supreme Court decided in the Davis case was this:

> "What we decide on this branch of the case is this: when the purchase-money paid by a purchaser in good faith, of real estate of a decedent ordered to be sold by a Probate Court, has been applied to the extinguishment of a mortgage executed by the decedent upon the property sold, and constituting a valid incumbrance thereon, and it turns out that the sale is irregular or void, the purchaser cannot be ousted of his possession upon a bill in equity filed by the heir or devisee, without a repayment or tender of the purchase-money so paid and applied."

We think even a casual reading of Davis v. Gaines, *supra,* will disclose a complete dissimilarity of facts and the enunciation of a limited doctrine which in no manner applies to the facts at bar.

Massie v. McKee (Tex.), 56 S. W. 119, cited by appellants, involved a set of facts in no manner paralleling those at bar. In the Massie case the plaintiff, who was the judgment creditor and the purchaser at the sheriff's sale, moved to vacate the satisfaction of his judgment because he had acquired no title or interest in the land ostensibly acquired at the sheriff's sale. The rights of

third parties, innocent or otherwise, were not involved. We think that Massie v. McKee, *supra,* is not in point because there the plaintiff and judgment creditor received no consideration whatsoever for his judgment and the ensuing satisfaction. In the case at bar Margaret Cobb, the plaintiff and judgment creditor, received in cash every cent called for in her judgment and as to her there was no want or failure of consideration with respect to the satisfaction of judgment.

The same reasoning and distinction applies to *Townsend v. Smith,* 20 Tex. 465, 70 Am. Decis. 400, which also was a case where the plaintiff and judgment creditor failed to receive any consideration from the sheriff's sale, at which he was the successful bidder.

Likewise, *Mahrhoff v. Diffenbacher* (Ind.), 31 N. E. 41, also relied upon by appellants, is distinguishable because the plaintiff, who was the successful bidder at the sheriff's sale, received no money or thing of value for the satisfaction of his judgment. The plaintiff and judgment creditor's situation was entirely different from that of Margaret Cobb who received full satisfaction of her judgment.

Smith v. Reed, 52 Cal. 345, also is not in point because it involved a judgment creditor who thought he was purchasing the property of a debtor. In this case cited by appellants it affirmatively appears that the judgment creditor, who was the successful bidder at the sheriff's sale, paid no money but simply used his judgment as a paper credit. Reed received nothing for the satisfaction of his judgment and hence the court set the satisfaction aside.

Copeland v. Colorado Bank (Colo.), 59 Pac. 70, cited by appellants, is not pertinent because, unlike the case at bar, the plaintiff and judgment creditor obtained absolutely nothing in satisfaction of the judgment. In other words, there was a complete failure of consideration insofar as the judgment creditor was concerned.

Knaak v. Brown (Neb.), 212 N. W. 431, 51 A. L. R. 241, is merely authority for the following proposition:

> "thus in case of absence or failure of consideration, the entry may be vacated, as here the consideration for the satisfaction was a deed believed to be good, but in fact worthless."

Certainly, the above rule should not be applied to the instant facts because as to Margaret Cobb (the judgment creditor), there was no absence or failure of consideration. Margaret Cobb received in cash the full amount of her judgment.

Merquire v. O'Donnell (Cal.) 72 Pac. 337, relied upon by appellants, turns upon a special statutory proceeding requiring a revival of the judgment for the benefit of a purchaser at a sheriff's sale, if such purchaser fails to obtain possession of the property he bought because of some irregularity in the sale. Aside from the fact that Merquire v. O'Donnell is decided upon a code provision peculiar to California, we must keep in mind the fact that appellants' claim is not based upon the fact that they are or should be declared to be the owners of the property sold at the sheriff's sale. Appellants' position, by reason of the theory of their creditor's claim, must necessarily be limited to that of asserted

assignees of the Cobb judgment. Their rights can be no greater than those of their assignor.

Farmer, et al. v. Sasseen, et al. (Iowa), 17 N. W. 714, also relied upon by appellants, turns upon a special code provision of Iowa. The case is also distinguishable because the plaintiff and judgment creditor received nothing in satisfaction of his judgment. In short, there was a complete absence and failure of consideration, neither of which can be claimed in the case at bar.

The same reasoning and distinction apply to *Kerchevel v. Lamarr*, 68 Ind. 442, also relied upon by appellants.

With the reasoning of that case and the numerous others upon which appellants pin their hope of reversal we have no quarrel. All that is declared in that line of decisions is that *if there is an absence or failure of consideration with respect to the judgment creditor, the sheriff's sale will be set aside.* The cases cited by appellants merely hold that if the judgment creditor is not actually paid, or if so far as the judgment creditor is concerned there has been a want or failure of consideration, that fact may be shown and relief may be granted to such judgment creditor.

D.

Appellants' assertion that they are subrogees is not entitled to weight for three reasons: *First,* it was not an element or partial basis of their claim as filed with the Receiver and the theory of subrogation was not presented to the Special Master nor urged to the court below (Tr. 7-9, and 21-23). It is a tardy afterthought and may not be raised or litigated here.

Tevis v. Ryan (Ariz.) 13 Ariz. 120, 108 P. 461; affirmed in 233 U. S. 273, 34 S. Ct. 481, 58 L. Ed. 957;

Mulrein v. Walsh, 26 Ariz. 152, 222 P. 1046;

Williams v. Klemovitz, 53 Ariz. 193, 87 P. (2d) 269;

Leggett v. Wardenburg, 53 Ariz. 105, 85 P. (2d) 989;

Pacific Finance Co. v. Gherna, 36 Ariz. 509, 287 P. 304.

Second, even if the doctrine of subrogation were available to appellants for argument, the fact remains that Margaret Cobb has never assigned her judgment to appellants. There is no privity of contract or chain of title to the judgment between her and appellants. The only assignment attempted to be made by Margaret Cobb was on May 17, 1934, and that purported assignment ran to Barrett, who so far as the record shows never thereafter assigned whatever rights he might be said to have acquired. The record merely shows that on April 30, 1934 (seventeen days before Margaret Cobb assigned to him), Barrett attempted to assign the judgment to appellants. This attempted assignment was a nullity because when it was made the Cobb judgment had been paid in cash and was fully satisfied, and for the further reason that on April 30, 1934, Barrett had no assignment of or interest in the judgment from Margaret Cobb. *Third,* the facts and circumstances of the full payment of the judgment (Tr. 13-14) and its concurrent satisfaction deny the right of subrogation. The doctrine is unavailable. 60 *Corpus Juris,* p. 722, pp. 30.

CONCLUSION

Upon the record and the clear, legal principles which are controlling, we submit that no reversible error on the part of the trial court has been made to appear and that hence the order should be affirmed.

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